STRATEGY RESEARCH PROJECT

EXECUTIVE PRIVILEGE vs LEGISLATIVE STATUTE: NATIONAL SECURITY CLASSIFICATION POLICY

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USAWC CLASS OF 2000

U.S. ARMY WAR COLLEGE, CARLISLE BARRACKS, PA 17013-5050

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ABSTRACT

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TITLE: Executive Privilege vs. Legislative Statute: National Security Classification Policy

FORMAT: Strategy Research Project

DATE: 24 March 2000 PAGES: 25 CLASSIFICATION: Unclassified

Secrecy has been used since the Colonial days to protect our national interests. With the end of the Cold War and a perceived lack of serious and visible threats to our national security, members of Congress are taking the opportunity to push for statutory reform of the classification system. Starting with the Truman Administration, presidents have issued executive orders to classify secrets and protect national security. Statutory codification of the current classification policy would render a president's use executive privilege to protect national security obsolete. Upsetting the Constitutional balance of power between the Executive and Legislative Branches of government, a classification statute would tip the scales in favor of the Legislative Branch. The proposed statute is flawed and, if implemented, would seriously weaken our national security, as well as change the balance of government power. While the current policy is not perfect, it does protect our national security, reduce government secrecy, and maintain the balance of power. Therefore, the current policy should continue to govern the national security classification system.

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Secrecy has played an important historic role in the United States as a means of protecting our national interests and maintaining our security and super-power status in the world. Secrecy is essential to the functioning of the U.S. Government; it serves our national security interests, and, thereby, it serves our public interests. Secrecy protects our national interests by controlling national security information and by denying our adversaries or potential adversaries access to it. National security information, by definition, is material that, if released, would damage the national interest. It includes all national defense or foreign affairs data owned by, produced by or for, or is entrusted to the U.S. Government.

Since becoming the world's sole superpower the United States has become the most prominent intelligence target in the world. Intelligence provides the information advantage necessary to support U.S. national security policy and to successfully execute national security operations. Successful intelligence requires secrecy.[1]

With the collapse of the Soviet Union and the end of the Cold War, many legislators perceive the absence of a serious visible threat to our national security. Though secrecy is "an essential component of an effective national security," said Representative Lee H. Hamilton (D-IN), "we have gone overboard."[2] He believes that "information has been classified often not to protect national security, but to protect national security officials from embarrassment and inquiry."[3] The decision to share or to withhold information could be–can be–highly personal and political rather than purely professional. When secret information is withheld for personal or political reasons, democracy is endangered. Thus Congress has been pressing for reduced government secrecy.

While we have experienced some relief and peace dividend by the demise of the Soviet Union, our national security remains a vital concern. And the current argument that the end of the Cold War requires a new way of thinking about secrecy puts our nation at risk–an unnecessary risk. While it is true that the Soviet Union has dissolved and the bipolar threat of the Cold War is over, dynamic change and great uncertainty have marked recent years.

Now our national security is threatened by asymmetric means of attack including terrorism, drugs, global crime, and weapons of mass destruction (WMD). National security threats come from our partners and allies, competitors, adversaries, and renegades. Security threats are more numerous, more difficult to anticipate, and therefore more difficult to counter than ever before. Secrecy, therefore, remains essential for protecting our national security. With the American public placing such a high value on U.S. strength and security, reformers may be gravely mistaken if they do not keep this in mind.[4]

This study reviews our government's uses of secrecy and our continued need for secrecy. It discusses the current classification policy for protecting national security information. As well, it analyzes the statutory classification policy proposed by Congress to bring about more openness and reduce government secrecy.

This study will show that while the current policy is not perfect, it does protect our national security, reduce government secrecy, and provide appropriate openness. This study will also show that while the proposed policy does elevate some good discussion items, its implementation would harm our national security as well as change the Constitutional balance of power between the Executive and Legislative Branches. Therefore, the current policy, vice the proposed policy, is the method for protecting national security, reducing government secrecy, promoting openness, and maintaining the Constitutional separation of powers.

SECRECY IN THE U.S. GOVERNMENT

Throughout our history, national interests have required that certain information be maintained in confidence to protect our citizens, our democratic institutions, and our participation within the community of nations. Realizing the value of U.S. information to potential enemies, the U.S. Government, from its beginning, has sought to protect our national security information from internal and external adversaries and spies. Our American forefathers used secrecy even before there was an U.S. Government. Both military and civilian leaders in the Revolutionary War era through contemporary presidents have recognized the need for secrecy to protect the welfare of our country. The concept of national security was surely one of the "Enterprises" that George Washington referred to in July of 1777 when he stressed the need for secrecy to protect our national interests:

> The necessity of procuring good intelligence is apparent and need not be further urged. All that remains for me to add is, that you keep the whole matter as secret as possible. For upon Secrecy, success depends in most Enterprises of the kind, & for want of it, they are generally defeated, however well planned.

Historically, Presidents have protected national security information by invoking what has come to be called "executive privilege." The doctrine of executive privilege empowers the President to withhold national security information from Congress, the courts, and the public.[5] The protection of national security was cited among the official duties of the President as laid out in Article Two of the U.S. Constitution.[6] President Washington, in 1794, set the precedent for the use of executive privilege.

Executive privilege is a mixture of law and politics, rather than a purely legal concept. It is based on the Constitution's separation of powers between the executive, legislative and judicial branches of the government.[7] The separation of powers, maintained by a system of checks and balances among the branches, ensures that a single branch does not abuse its power. No one branch is sufficiently powerful to override another. Executive privilege, therefore, is essential to maintaining the balance of power between the Executive Branch and the Legislative Branch. It is one of the checks and balances interwoven throughout the Constitution designed to ensure that the government remains accountable to those it governs.[8]

Executive privilege can, and has been, abused. Today, mention of executive privilege conjures up images of recent Presidents' attempts to use the privilege of secrecy to obstruct justice. Most Americans are aware of recent abuses of secrecy such as President Nixon's invocation of executive privilege to cover up his administration's involvement in the break-in at Watergate. They are also aware of the secrecy surrounding the Reagan administration's sale of arms to Iran in an attempt to raise funds to support the Contra's efforts to overthrow the Nicaraguan government.

The tension created between the Branches trying to maintain a balance between secrecy and disclosure, felt by both the public and the government since the beginning of the American republic, has increased over the past fifty years.[9] As early as the mid-50s, Congress became concerned over the extent of executive secrecy and attempted to seize some control.[10] Congress passed in the 1960s, and later strengthened, the Freedom of Information Act (FOIA) to create a counterbalance to the power of executive secrecy. Congress continued at that time to defer all foreign policy and national security matters to the President. But then the Watergate scandal, followed by subsequent investigations of intelligence activities, eroded the trust Congress had placed in the Executive Branch's handling of foreign policy and national security matters. By the mid-1970s Congress was demanding greater oversight of U.S. intelligence activities.[11] To provide such oversight, Congress created the U.S. House of Representatives Permanent Select Committee on Intelligence (HPSCI) and the U.S. Senate Select Committee on Intelligence (SSCI).[12] Since 1976, the HPSCI and SSCI have routinely obtained highly classified and sensitive information from the Executive Branch.[13]

Today, however, many Americans question the risks to our national security, and therefore, the continued need for secrecy. Proponents for reduced secrecy, as well as classification policy critics, view the Soviet Union's collapse as a window of opportunity for reform. They seek to re-assess the security classification system, to examine the validity of executive orders, and to amend what Congress sees as an imbalance between the branches of government. Proponents believe that the time is right for statutory legislation to impose classification standardization, oversight, and accountability.

Proponents for Congress's proposed classification system assert that the Executive Branch uses secrecy to withhold politically sensitive information and to disguise unpopular policies. Proponent Senator Jesse Helms (R-NC) casts secrecy as a political tool.[14] Representative Lee Hamilton (D-IN) points out that secrecy concentrates power in too few hands.[15] Proponents for reducing government secrecy are asserting that excessive secrecy keeps policy-makers uninformed, keeps public citizens from holding our leaders and decision-makers accountable, and keeps both from fully participating in debates and discussions.

As long as the Soviet Union threatened national security, previous attempts at true reform were blocked. Now Congress is seeking to replace the Executive Branch's system for deciding what is secret and what is not secret with a system based on legislative statute, essentially telling the Executive Branch what it can and cannot keep secret from Congress. The debate over reform continues.[16]

In 1994, Congress mandated the Commission on Protecting and Reducing Government Secrecy to again initiate classification reform.[17] Even though none of the last six major investigations have led to substantive revision, the Legislature is hopeful that this new Commission will result in change.[18]

The Commission's core objective is to ensure that secrecy proceeds according to law. They stated that the current classification policy and system lacks the discipline of a legal framework to define and enforce the proper uses of secrecy. While almost every presidential administration has issued its own classification policy via an executive order, the Commission maintains that none has resulted in a stable and reliable classification system. The Commission also noted that the snowballing effect of successive executive orders has produced a very complex and expensive system, whereby rules and procedures have proliferated and taxpayer's costs for the protection of our national security information has increased.

The Commission's report offers an opportunity to harness good ideas, accept valid suggestions to improve the security system, and to make classification and declassification efforts more efficient.[19] It indicates that true reform requires open-mindedness, cooperation between the Executive and Legislative branches, and interagency action by all stakeholders.[20]

Their report has motivated Senator Moynihan to lead the charge for more openness and the enactment of a statutory resolution. Senator Moynihan, perhaps the most vocal advocate for secrecy reform today, believes that secrecy is the ultimate form of Government regulation.[21] He argues that too much secrecy hurts our democracy, breeds mistrust, and undermines the Government's credibility. According to Senator Moynihan, "Secrecy can be a source of dangerous ignorance...It is time to assert certain American fundamentals, foremost of which is the right to know what Government is doing, and the corresponding ability to judge its performance."[22] But not even he can identify a single secret, out of all of the nation's millions or billions of secrets, that should be exposed.[23]

The Clinton Administration's recent declassification actions have realized a major policy goal. Supporting openness when appropriate, this administration has declassified millions of pages of information, more than any other administration, and made the information publicly available. This openness, enabled by the Internet, assures an open society with access to enormous amounts of information. But the open society is not limited to U.S. citizens; foreigners, adversaries, potential spy-recruits, terrorists, and rogue nations also have access to the Internet and our valuable information. Openness helps would-be spies gather information more quickly than ever before. Openness, while serving the American public's interest, also puts disclosed national security information at risk.

CURRENT CLASSIFICATION POLICY

The classification system to protect government secrets, in place since the 1940s is implemented through presidential executive orders (E.O.). The current policy, set forth in E.O. 12958, "Classified National Security Information," tightened loopholes to prevent the possibility of abuses and supports openness.[24] Signed by President Clinton in April 1995, this policy prescribes a consistent and documented system for protecting and declassifying national security information. It emphasizes

President Clinton's commitment to the principle of open government while continuing to protect national security information.

This policy is the result of the government's first attempt to revise the security classification system since the end of the Cold War. It revised much of the former classification procedures in an effort to reduce government secrecy. The classification policy is a cooperative effort between the President and various pedagogical groups who advised him on various policies and implementing directives, as well as proposed recommendations for change. The policy now reflects our vision of American democracy in the post-Cold War world. In keeping with the Clinton Administration dedication to public disclosure and openness in government, E.O. 12958 acknowledges the need for the American people to be informed of the government's activities and allows for such provisions. The need for openness, which is stressed under this policy, is kept in check by an interagency panel that approves, denies, or amends agency exemptions from automatic declassification. The panel resolves appeals for mandatory declassification and settles challenges to classification decisions.

Executive Order 12958 both limits classification usage to prevent abuse and demands accountability for secrecy decisions. Classifiable categories of national security information are explicitly limited to ensure that only genuine national security information is protected from public disclosure. The policy prohibits the classification of certain types of information to protect bureaucratic or political interests and information that conceals violations of law or administrative errors. It prohibits classification of information to restrain competition. It also prohibits classification of information that was previously declassified. Abusers, personnel who knowingly, willfully, or negligently violate this executive order, are sanctioned. Sanctions can include reprimand, suspension without pay, removal from office, termination of classification authority, and the loss or denial of access to classified information.

The President is accountable to U.S. citizens for the classification policy. But classification and declassification are decentralized. Accountable personnel within a given classifying agency direct and implement the policy locally. Each classifying agency maintains a credible classification guide to document the agency's classification, review, and declassification procedures. Each classifying agency also has trained classification authorities that teach individual accountability to its employees.

In 1999 President Clinton modified the policy when he issued Executive Order 13142, Amendment to Executive Order 12958, Classified National Security Information.[25] The amendment made the President, instead of the Office of Management and Budget (OMB), responsible for approving individual exceptions to the automatic declassification process. It gave program direction responsibilities, which had been held by the Director of the OMB, to the Director of the Information Security Oversight Office (ISSO). And it changed the effective date of automatic declassification procedures from five years to six and one-half years.

When he signed E.O. 12958, President Clinton stated that his administration would "no longer tolerate the excesses [of classification]."[26] But he also declared "We must continue to protect information that is

critical to the pursuit of our national security interests."[27] Our current policy actively supports openness. At the same time, it also protects national security information while it reduces government secrecy.

EXECUTIVE PRIVILEGE

From the 1940s to the present time, a succession of ten presidential executive orders have established and implemented classification systems to protect government secrets. Presidents have issued these orders to fulfill their Constitutional responsibility to constantly and assiduously protect the national security of the United States. In order to respond to the ever-changing environment, the President has the flexibility to modify an executive order. Because of this flexibility, the classification policy can be modified as the need arises, and, thus, has been changed over the course of the past fifty years to meet new security concerns and to respond to world transformations. This advantage, however, is also a disadvantage since any presidential administration can modify the current policy. Therefore, the classification policy could essentially change with every newly elected president; multiple policies could pose a risk to building a stable classification foundation.

CLASSIFICATION STANDARDS

Under the current policy, when there is significant doubt about the need to classify, a classifier shall not classify the information. When there is significant doubt about the level of classification, a classifier shall classify the information at the lower level. With the adoption of Executive Order 12958, Clinton implemented a more liberal policy toward classification and declassification than that of the previous policy implemented by President Reagan.

This liberal policy has not gone far enough to suit supporters of further openness, despite recognizing that an error in judgement in which classified information is disclosed could result in exceptionally grave damage to our national security. While the current policy restores the Carter requirement that a classifier be able to identify or describe the potential damage that would result from the disclosure of classified information, a policy advocating too much openness and the subsequent disclosure of valuable information will compromise our national security, our relationships, and our sources and methods. In accordance with Clinton Administration policy, declassification has moved very quickly. Since the policy has taken effect, declassification actions have resulted in the disclosure of over forty-five million pages of documents–almost 14% of the National Archives' classified holdings.[28] These declassification actions did reduce secrecy, but recent policy declassification decisions may have disclosed too much classified information, since some documents *were not even reviewed prior to declassification.*[29] What are the chances that spies and terrorists have already found what they wanted in declassified and released documents?

The declassification of nuclear weapon information, along with the 1999 Chinese espionage scandal, has put our nuclear program at risk. Addressing this issue, Senator Jon Kyl (R-AZ) revealed that "In a recent 140-page study of improperly released nuclear weapons data, the administration detailed numerous examples of key design information that was not intended to be released, but, in fact, was

released. I support efforts to release government information to the public, but in doing so we have to be careful not to continue to accidentally release sensitive nuclear weapons design data that countries like Iran and Iraq could use to advance their own weapons programs."[30] Redressing the problem of improper declassification, Congressional language in the Defense Authorization bill for 1999 effectively de-energized current declassification efforts.[31] Furthermore, the House and Senate Armed Services Committees reduced the Pentagon's declassification budget from $200 million a year to $51 million a year.[32] Congress, heretofore pushing for reduced secrecy and openness when it suited their goal of usurping executive privilege, is now limiting openness to protect national security. Congress wants openness, but only on its own terms.

Our national security is not alone in being negatively affected by our declassification actions. Declassification actions can also harm our foreign government relationships. Currently, foreign government information in the custody of the U.S. Government is subject to the mandatory declassification review provisions of E.O. 12958.[33] The declassification of such information could reveal the existence of sensitive relationships; declassified information could also expose intelligence gathering sources and methods. When this information is disclosed, foreign governments would probably curtail or even stop providing information to the United States. Sound foreign government relations will only last as long as the United States is able to maintain confidentiality.

PROPOSED STATUTORY CLASSIFICATION POLICY

Implementation of the proposed statute would ensure that secrecy proceeds according to the law. Components of this statute would codify classification and declassification procedures, and institute a judicially enforceable balancing test for classification decisions. But while this statute offers ideas and suggestions to improve the current classification system, it does not correct any deficiencies noted in the current policy. In fact, this proposed statute would introduce even more system deficiencies. This proposal would radically change the venue for classifying national security information from the Executive Branch to the Legislative Branch. It would introduce judicial review into the system. Ultimately, those actions weaken the position of the Executive Branch vis-a-vis the other two branches of the government. Such changes to the present system of checks and balances among the three branches risk tipping the scales in the balance of power among the Executive, Legislative, and Judicial Branches.

STATUTE

The proposed legislative statute would, it is believed, provide a stable and legal foundation to the classification system. But this ignores practical realities. With codification of the proposed classification policy becoming a matter of statutory law, flexibility to effect change becomes unlikely. With the loss of flexibility, adjusting the policy in response to changing circumstances would be cumbersome. While laws can be amended, Congressional effort to do so is time consuming and, due to political reasons, may not have the desired outcome. Codification would eliminate the flexibility necessary for the Department of Defense (DoD) to manage its extensive and complex classification program that is already present in the

current policy.[34] Codification would also override existing agreements between the Executive Branch, the Department of Defense, and foreign governments, leading to the disclosure of sensitive foreign government information. As with the current policy, this would threaten our Second and Third Party relationships.

And, of course, by intruding upon the President's constitutional rights and usurping his executive privilege, codification would upset the Constitutional balance of power by giving Congress control of the classification system. Recognizing the potential imbalance of power, Deputy White House Chief of Staff John D. Podesta, a member of the Moynihan commission, said Congress must ensure that any legislation on secrecy "doesn't impinge on the President's authority to carry out national security."[35] The current policy, whereby the president determines government secrecy, helps maintains the balance of power between the Executive Branch and the Legislative Branch

JUDICIALLY ENFORCEABLE BALANCING TEST

The proposed statute contains a judicially enforceable balancing test. The test helps classifiers balance the public need-to-know against possible damage to national security by unauthorized disclosure. While this test reduces government secrecy and supports disclosure, it urges classifiers to err on the side of public interest similar to the current policy. At first glance, a judicially enforceable balancing test to hold classifiers accountable makes sense, but it is not really practical; besides, the current policy already mandates accountability.[36] Since justices generally lack expertise in national security issues, the courts usually defer to the administration's classification decisions. But judicial review of a classification decision under this proposal would involve legal proceedings to openly debate the issue. These open debates would result in the disclosure of classified information. The current policy does not create any substantive or procedural rights subject to judicial review, preventing the disclosure of classified information during a trial. Unlike the interagency panel designated in the current policy to settle challenges to classification decisions, a judge would decide the merits of such a case under this balancing test. Any judicial intrusion on the presidential authority to protect national security information will further disrupt the balance of power. The current policy maintains constitutional balance of power.

This balancing test requires classifiers around the world to universally consider the public interest when considering disclosure. Classifiers lack an objective basis for assessing the public interest in disclosure or in measuring when such a public interest "outweighs" a national security interest. Since classifiers cannot identically judge the public interest in disclosure, this test would result in the inconsistent determination of classification decisions. This inconsistency would hurt national security by protecting, or not protecting, the same information at the same or different classification levels. By focusing on damage to the national security as directed under the current policy, classifiers around the world can make the same classification decisions. Both policies' classification procedures, however, risk damage to our national security: the current policy does not allow classification, or requires classification at a lower level, when there is doubt about the need to classify; the proposed policy advocates error on the side of disclosure.

Maintaining that the judicially enforced balancing test damages national security and leads to inconsistent classification decisions, the current administration opposes the judicially enforceable balancing test.[37] Speaking for the Clinton Administration, National Security Advisor Samuel R. Berger stated that "We have concluded that the balancing test must be eliminated in order to protect essential presidential authority and to ensure that the legislation introduces no new rights of judicial review.[38] In addition to the current administration, even some members of Congress object to the judicially enforceable balancing test. One such congressional member, Senate Majority Leader Trent Lott, hinted that he would like to overturn the judicial review of classification decisions.[39] As put bluntly by DEPSECDEF John Hamre, "The 'public interest' in the content of the information should not be a consideration."[40] The power over the classification system is certainly one of politics.

CONCLUSION

Given the vastness of the task of protecting national security information, while at the same time reducing government secrecy and promoting openness, it is apparent that several questions must be answered simultaneously. Questions such as what constitutes a secret, which current secrets should be disclosed, and what is in the public's best interest are not so simple to answer. The proposed classification policy attempts to answer these questions. However, it actuality hurts more than it helps.

The proposed statute would create a stable foundation, but that very foundation removes the flexibility that is so advantageous today. The statute would also tip the balance of power in the Legislative and Judicial Branches' favor, invalidate the president's executive privilege, and threaten our Second and Third Party relationships. The current policy reinforces executive privilege and maintains the balance of power. However, both policies put our national security and foreign government relationships at risk by implementing weak declassification procedures.

The proposed judicially enforceable balancing test seeks accountability for classification decisions, but the Clinton Administration policy already mandates accountability and even addresses possible sanctions for classification violations. While the proposed test would result in a judicial settlement of a classification challenge, the current policy confers no rights of judicial review. The proposed policy neither mends the current policy's faults nor can be implemented without its own shortcomings. The proposed policy does not add anything of value to the current policy and would, in fact, have dire consequences. Implementing the proposed classification statute would do more than put our national security at risk. This statute's driving force appears to be political; The result of the power struggle could tip the balance in favor of the Legislative Branch.

It would appear that both policies have attributes that can be harmful to our national security. The policy attributes of the balancing test and the declassification procedures possess characteristics that are both good and bad. But changes caused by the loss of executive privilege that would be a concomitant of the proposed statutory classification system could prove additionally harmful by its second and third order

effects, because the statutory proposal would be altering the traditional balance of power between and among the Executive, Legislative, and Judicial Branches of our government.

While the current policy is not perfect, it does protect our national security. It has reduced government secrecy. And it does provide for appropriate openness. The proposed policy does serve to raise important points for discussion. But implementing the proposed policy would not correct flaws in the current policy. It would not protect our national security any more effectively. And it would change the balance of power as traditionally practiced among the Executive, Legislative, and Judicial Branches. Therefore, the current policy, vice the proposed policy, is the best classification system for the times. It protects our national security. It reduces government secrecy. It promotes openness. And it supports, rather than attenuates, the Constitutional separation of powers.

Word Count: 4,503

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[17] U.S. Congress, 1. The Commission on Protecting and Reducing Government Secrecy began its investigation into government secrecy in 1994. Congress created it under Title IX of the Foreign Relations Authorization Act for Fiscal Years 1994 and 1995 (Public Law 103-236). This Commission conducted "an investigation into all matters any way related to any legislation, executive order, regulation,

practice, or procedure relating to classified information or granting security clearances." The Commission documented its findings in the Report of the Commission on Protecting and Reducing Government Secrecy, dated March 3, 1997.[17] They supported and proposed the Government Secrecy Reform Act of 1998. The bill, S.712 was filed on July 22, 1998. It was passed to a committee and no further action was taken.

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